

***United States Court of Appeals  
for the Second Circuit***



**REPLY BRIEF**





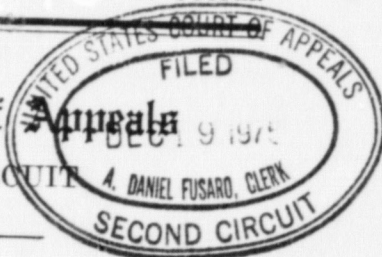


# 75-7534

*Civil 6/1/75*

To be argued by  
BURTON S. COOPER

United States Court of Appeals  
FOR THE SECOND CIRCUIT



LORRAINE BERMAN,

Plaintiff-Appellant,

against

CARL A. VERGARI, District Attorney of  
Westchester County,

Defendant-Appellee.

**REPLY BRIEF**

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# United States Court of Appeals

FOR THE SECOND CIRCUIT

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LORRAINE BERMAN,

*Plaintiff-Appellant,*

*against*

CARL A. VERGARI, District Attorney of  
Westchester County,

*Defendant-Appellee.*

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## REPLY BRIEF

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### **The Circumstances of This Case Warrant the Intervention of the Federal Court to Stay a State Court Prosecution Brought Pursuant to an Indictment Which Was Unconstitu- tionally Secured**

In arguing that the appellant has no Fifth Amendment right to an indictment by a grand jury in a state prosecution (p. 6 appellee's br.), the appellee misconceives the thrust of *Peters v. Kiff*, 407 U.S. 493 (1972) and *Taylor v. Louisiana*, 419 U.S. 522 (1975). Both cases held that the systematic exclusion of a class of persons from service on juries was an unconstitutional deprivation of Fourteenth Amendment guarantees of equal protection and due process.

Further, in *Peters*, it was held that a "State cannot, consistent with due process, subject a defendant to *indict-*



ment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process." [Emphasis supplied]. 407 U.S. at 502.

Appellee suggests that because there has been no judicial determination of unconstitutionality of the New York State Judiciary Law § 665(7) that the statute is not patently and flagrantly violative of the Constitution. He further suggests that in the absence of such judicial determination the statute was only possibly unconstitutional "on its face" and that, therefore, according to *Younger*,<sup>1</sup> an injunction should not issue.

Appellant submits that in *Younger* there was no prior adjudication of the unconstitutionality of a statute virtually identical with the statute in question. In that case, the statute in question had not been repealed by virtue of its recognized unconstitutionality and, in that case, the defendant had not conceded its unconstitutionality in the courts below. The New York statute is patently and flagrantly violative of the Constitution and the appellee does not and could not, in this Court, suggest otherwise.<sup>2</sup>

Appellee argues that *Taylor* should not apply retroactively to indictments prior to the *Daniel*<sup>3</sup> decision, notwithstanding *Daniel's* express rationale for denying retroactive application of *Taylor* to only those cases in which there has been a conviction. *Daniel* specifically

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<sup>1</sup> *Younger v. Harris*, 401 U. S. 37 (1971).

<sup>2</sup> Significantly, the *Younger* court also said: "A statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. . . ." 401 U.S. at 52.

<sup>3</sup> *Daniel v. Louisiana*, 420 U.S. 31 (1975).



stated that it sought to avoid the necessity for numerous retrials. It nowhere suggested that the principles enunciated in *Taylor* should not apply where, as here, no trial had been held.

Prosecution by state officials without hope of obtaining a valid conviction warrants federal injunctive relief against such prosecution. *Perez v. Ledesma*, 401 U.S. 82, 85 (1971).

In this case, the appellee cannot hope to secure a valid conviction. Federal injunctive relief is appropriate.

### CONCLUSION

**The orders below should be reversed and the court below should be directed to issue a preliminary injunction.**

Respectfully submitted,

SHATZKIN, COOPER, LABATON,

RUDOFF & BANDLER

*Attorneys for Plaintiff-Appellant*

*Of Counsel:*

BURTON S. COOPER

DOUGLAS A. COOPER



## United States Court of Appeals

~~New York State Bar Association~~ The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007  
For the Second Circuit

Lorraine Berman  
Plaintiff-Appellant

against

Carl A. Vergari, District Attorney of  
Westchester County  
Defendant-Appellee

State of New York, County of New York, ss.:

Raymond J. Braddick, , being duly sworn deposes and says that he is  
agent for Shatzkin Cooper & Labaton the attorney  
for the above named Plaintiff-Appellant herein. That he is over  
21 years of age, is not a party to the action and resides at 8 Mill Lane Levittown, New York

That on the 19th. day of December , 1975, he served the within  
Reply Brief

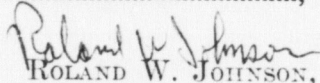
upon the attorneys for the parties and at the addresses as specified below

Carl A. Vergari  
District Attorney  
of Westchester County  
County Court House  
White Plains, New York

by depositing 3 true copies  
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-  
tained by the United States Government at  
90 Church Street, New York, New York  
directed to the said attorneys for the parties as listed above at the addresses aforementioned,  
that being the addresses within the state designated by them for that purpose, or the places  
where they then kept offices between which places there then was and now is a regular com-  
munication by mail.

Sworn to before me, this 19th.

day of December, 1975

  
ROLAND W. JOHNSON,

Notary Public, State of New York  
No. 4509705

Qualified in Delaware County  
Commission Expires March 30, 1977

